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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 885

CHARLES E. WILLIAMS, *Petitioner;*

v.

HOT SHOPPES, INC., *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES E. WILLIAMS,
Petitioner, Pro se
1329 Shepherd Street, N. W.
Washington 11, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX AND TABLE OF CASES

	Page
Opinion below	2, Appendix
Jurisdictional statement	2
Questions presented	2
Statute involved	3
Statement of the case	4
Reasons for allowance of the writ	5
1. The precise question has never been before the Court	6
2. The decision below is in conflict with applicable decisions of this Court	7
3. A serious federal question concerning discrimination based on color is presented	10

CITATIONS

CASES:

Ala. State Federation of Labor v. McAdory, 325 U.S. 450	8
Ark. Natural Gas Co. v. Ark. RR. Comm., 261 U.S. 379	8
Baldwin v. Franks, 120 U.S. 678	7
Boynton v. Va., 364 U.S. 454	10
Butts v. Merchants & Miners Transp. Co., 230 U.S. 126	6, 9
Civil Rights Cases, 109 U.S. 3	6
Clark v. Barnard, 108 U.S. 436	8
D. C. v. John R. Thompson Co., Inc., 346 U.S. 100	9
Hurd v. Hodge, 334 U.S. 24	9
James v. Bowman, 190 U.S. 127	7
Kansas City Southern Ry. Co. v. Anderson, 233 U.S. 325	7
Logan v. U. S., 144 U.S. 263	7
Monroe v. Pape, 365 U.S. 167	7, 9

	Page
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1	8
Nashville C. & St. L. Ry. Co. v. Walters, 294 U.S. 405	7
Overnight Motor Transp. Co. v. Missel, 316 U.S. 572	10
Porter v. Investors Syndicate, 286 U.S. 461	8
St. Louis, Iron Mtn. & Southern Ry. Co. v. Wynne, 224 U.S. 354	7
Sandberg v. McDonald, 248 U.S. 185	8
U. S. v. CIO, 335 U.S. 106	8
U. S. v. Dow, 357 U.S. 17	8
U. S. v. Harris, 106 U.S. 629	7
U. S. v. Mosley, 238 U.S. 383	8
U. S. v. Raines, 362 U.S. 17	6, 9
U. S. v. UAW-CIO, 352 U.S. 567	8
U. S. v. Universal C.I.T. Credit Corp., 344 U.S. 218	8
Valle v. Stengel, 176 F. 2d 697	7
Williams v. Hot Shoppes, Inc., 110 U.S. App. D.C. 358, 293 F. 2d 835	2, 4, Appendix
Williams v. Howard Johnson's Restaurant, 268 F. 2d 845	7
Yates v. U. S., 354 U.S. 298	8

STATUTES:

28 U.S.C. §§ 1254(1), 2101(c)	2
28 U.S.C. §§ 1343, 1355	4
42 U.S.C. § 1984	2, 4
Civil Rights Act of 1866:	
R. S. §§ 1977, 1978, 42 U.S.C. §§ 1981, 1982	9
Civil Rights (Ku Klux Klan) Act of 1871:	
R. S. § 1979, 42 U.S.C. § 1983	2, 4, 5, 7, 9
R. S. §§ 5336, 5507, 5508, 5519	8
Civil Rights Act of 1875:	
c. 114, 18 Stat. 336, 1 Supp. R. S. 148 (1881) & 1 Supp. R. S. 67 (1891)	2, 3, 5, 6, 7, 10
D. C. Civil Rights Ordinances:	
(D. C. Laws, 1871-1873, pp. 65, 116)	9

Page

Virginia Segregation Law:

Va. Code sec. 18-327 (1950) (Now sec. 18.1-356, Va. Code Ann., Supp. 1960) 4

MISCELLANEOUS:

Wormuth, The Present Status of the Civil Rights Act of 1875, 6 UTAH L. REV. 153 6

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CHARLES E. WILLIAMS, *Petitioner*,

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Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Charles E. Williams, petitioner, prays that a writ of certiorari issue to review a final order entered by the United States Court of Appeals for the District of Columbia Circuit on November 17, 1961, dismissing the appeal, upon which a rehearing was denied by order entered March 12, 1962.

OPINIONS BELOW

No opinions were delivered upon the rendering of the judgment sought to be reviewed. However, the appeal was dismissed in accordance with a prior opinion, reported at 110 U.S. App. D.C. 358, 293 F. 2d 835, the pertinent portion of which is printed in the Appendix hereto.

JURISDICTION

The judgment sought to be reviewed was entered November 17, 1961. A timely petition for rehearing was filed November 29, 1961, and was denied by order entered March 12, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2101(e) and 42 U.S.C. § 1984.

QUESTIONS PRESENTED

1. Whether the pending amended complaint, alleging the exclusion of petitioner from respondent's restaurant, solely because petitioner is a Negro, under color of state law, custom or usage in violation of the civil rights acts and held sufficient to state a claim for damages under 42 U.S.C. § 1983, states a claim for the civil penalty and full costs provided in the Civil Rights Act of 1875.

2. Whether the Civil Rights Act of 1875, rejected as invalid in cases involving *purely* private discrimination, is constitutional as applied to private action that has the sanction and support of state action.

3. Whether the Act has a separable, uniform state-action application which was intended to stand as valid irrespective of the legality of any other application.

4. Whether the terms "inns" and "other places of public amusement" in the Act, for purposes of the remedial sanction, were intended to, and do, embrace public restaurants.

STATUTE INVOLVED

The pertinent sections of the Act of March 1, 1875, c. 114, 18 Stat. 336, 1 Supp. to Rev. Stat. 148 (1874-1881), 1 Supp. to Rev. Stat. 67 (1874-1891) provide:

> [Sec. 1] That *all persons* within the jurisdiction of the United States *shall be entitled to the full and equal enjoyment of the accommodations*, advantages, facilities, and privileges *of inns*, public conveyances on land or water, theatres, *and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race* and color, regardless of any previous condition of servitude.
>
> Sec. 2. That *any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color*, and regardless of any previous condition of servitude, *the full enjoyment of any of the accommodations*, advantages, facilities, or privileges in said section *enumerated, or by aiding or inciting such denial, shall*, for every such offense, *forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs;* and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any State: *And pro-*

vided further, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively. (Emphasis supplied).

STATEMENT OF THE CASE

The original complaint was filed in the U. S. District Court for the District of Columbia November 25, 1959, invoking jurisdiction under 28 U.S.C. §§ 1343, 1355 and 42 U.S.C. §§ 1983, 1984.

The gist of the pleading, aside from the allegation of injury and prayer for relief under the civil rights acts, was that petitioner-plaintiff, during regular business hours, sought the accommodations of a restaurant made generally available to the public by the respondent-defendant; that the latter, while disavowing private prejudice, excluded plaintiff therefrom, solely on a racial basis, under color of the Virginia segregated seating law, and that a systematic practice of restaurants in Virginia to exclude Negroes had been produced by the interplay of governmental and private action. (JA-1).

The complaint was dismissed for failure to state a claim for relief under the civil rights acts. (JA-6). Appeal followed.

The U. S. Court of Appeals for the District of Columbia Circuit rejected the contention that the complaint would permit proof of enforcement of racial segregation in restaurants by state officers and abstained from ruling upon the sufficiency of the claim under 42 U.S.C. § 1983 until a Virginia court determined the applicability of the segregation law to restaurants. 110 U.S. App. D.C. at pp. 360-366, 293 F. 2d at pp. 837-843.

The court below, nevertheless, affirmed dismissal of the claim under the Civil Rights Act of 1875 concluding that, even if the conduct complained of were state action, the Act would not apply. (Appendix).

Upon remand, the claim based on the segregation law was dismissed with leave to amend. The amended complaint was filed June 8, 1961, alleging, in effect: That state officials enforced segregation in restaurants by continually threatening to prosecute restaurant keepers who undertake to accommodate Negroes on a nonracial basis, thus aiding and abetting restaurant discrimination; that defendant excluded plaintiff from the restaurant while disavowing private prejudice and expressly stated that Virginia law, custom and usage compelled the exclusion of Negroes; and that defendant and other restaurant keepers systematically excluded Negroes from their facilities and thus aided and abetted the enforcement of the state custom of racial segregation to the injury of plaintiff in violation of the civil rights acts for which damages, the civil penalty and full costs were being sought. The legal sufficiency of the pleading was put in issue.

The District Court held that the amended complaint was sufficient to state a claim under 42 U.S.C. § 1983 but dismissed the claim under the Civil Rights Act of 1875. The court below, consistent with its prior opinion (Appendix), dismissed the appeal. Review by this Court is now sought.

REASONS FOR ALLOWANCE OF THE WRIT

The issue of whether the Civil Rights Act of 1875 has a valid application to state action is a novel, important and substantial question of federal law which has not been, but should be, settled by the Court. It

was decided below in a way as to conflict with applicable decisions of this Court. The question is of wide and special import extending far beyond the interests of the immediate parties. Hence, review by the Court, for the special reasons stated below, will eminently serve the public interest.

1. The Precise Question of Whether the 1875 Act Uniformly Applies to Discriminatory State Action in All Jurisdictions Throughout the United States, or whether Congress Conceived the Act to Have Precisely That Application, Has Never Been Before the Court

The Act, which has not been repealed, was voided in an application to *purely* private discrimination *unsupported* by state action in the *Civil Rights Cases*, 109 U.S. 3. Later, in *Butts* v. *Merchants & Miners Transportation Co.*, 230 U.S. 126, a case involving purely private discrimination in commerce, the Act was declared wholly invalid because Congress intended it to have a uniform national application and it was not possible to separate the valid application (to purely private action in the commerce jurisdiction) from the invalid application to such discrimination in the states.

In substance, all that *Butts* stands for is that the Act is wholly invalid as applied to purely private action. The Court was not called upon, as here, to decide, nor did it decide, whether the legislation has a separable, uniform, state-action application which was intended to stand as valid irrespective of the illegality of any supposed private action application. Since a state-action application of the Act was never properly before the Court on the record in any case, contentions of invalidity on that ground were not and could not be heard. See *United States* v. *Raines*, 362 U.S. 17, 24-25. See also Wormuth, The Present Status of the Civil Rights Act of 1875, 6 UTAH L. REV. 153 (1958).

The Third Circuit stated, in dictum, that Congress intended by the Act to guarantee to Negro citizens the right to engage in the pursuit of happiness. *Valle* v. *Stengel*, 176 F. 2d 697, 703. The court below held that the Act had no application to state action. And the Fourth Circuit was of the opinion that even if the Act has present validity it does not apply to public restaurants because, under Virginia law, a restaurant is not an inn. *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847n.

In view of the foregoing, the question of whether the 1875 Act was intended to supplement existing civil rights laws and apply against state-sanctioned racial restrictions in public restaurants, in precisely the same way as 42 U.S.C. § 1983 applies, is now ripe for decision and should be settled by this Court.

The demands of *stare decisis* do not preclude a thorough consideration of available evidence of Congressional purpose or a construction of the statute as if it were before the Court for the first time. See *Monroe* v. *Pape*, 365 U.S. 167, 220-222.

2. The Decision Below is in Conflict With Applicable Decisions of This Court

First, it has long been recognized that "** ** a statute valid as to one set of facts may be invalid as to another." *Nashville C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, 415. Compare *St. Louis, Iron Mountain & Southern Ry Co.* v. *Wynne*, 224 U.S. 354, where a statute was voided as a denial of due process, and *Kansas City Southern Ry. Co.* v. *Anderson*, 233 U.S. 325, where the same statute was validated. Compare also *United States* v. *Harris*, 106 U.S. 629, *Baldwin* v. *Franks*, 120 U.S. 678 and *James* v. *Bowman*, 190 U.S. 127, where various applications of the Ku Klux Klan Act of 1871 were voided; and *Logan* v. *United States*, 144 U.S.

263 and *United States* v. *Mosley*, 238 U.S. 383, where other or similar applications of the statute were validated.

Hence, this Court has strictly adhered to a long-standing practice never to decide a constitutional question abstractly or in advance of the necessity therefor, or until faced with cases involving particular provisions as specifically applied to persons who claim to be injured; and never to formulate a rule of constitutional law broader than the *precise* facts to which it is to be applied. *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461-462.

Secondly, the rules for dealing with an act of Congress (while they "do not solve the special difficulties in construing a particular statute" because "the variables render every problem of statutory construction unique"[1]) require a construction that will establish its validity.[2] "Even to avoid a serious doubt the rule is the same."[3] Since "the purpose of Congress is a dominant factor,"[4] the rules do "not permit disregard of what Congress commands."[5] Nor do they permit assumptions that Congress would choose "to disregard a constitutional danger zone;"[6] that Congress would open the door to "obvious incongruities and undesirable possibilities;"[7] that Congress would act improvidently or do a vain, futile or senseless thing.[8]

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[1] *U. S.* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221.

[2] *Porter* v. *Investors Syndicate*, 286 U.S. 461, 470; *Arkansas Natural Gas Co.* v. *Arkansas Railroad Comm.*, 261 U.S. 379, 383.

[3] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30.

[4] *U. S.* v. *CIO*, 335 U.S. 106, 112.

[5] *U. S.* v. *UAW-CIO*, 352 U.S. 567, 589.

[6] *Yates* v. *U. S.*, 354 U.S. 298, 319.

[7] *U. S.* v. *Dege*, 357 U.S. 17, 25.

[8] *Clark* v. *Barnard*, 108 U.S. 436, 460; *Sandberg* v. *McDonald*, 248 U.S. 185, 196.

Finally, the fact that the Act has not been tested since its rejection (in circumstances believed to have been *unintended*) would not prevent validation now, in view of: The application of the Civil Rights Act of 1866 for the first time in 1948 to discrimination enforced by governmental power;[9] the application of the D. C. civil rights ordinances of 1872-73 for the first time in 1953;[10] and the application of the Ku Klux Klan Act of 1871 for the first time in 1961 against unauthorized acts of state officers irrespective of the state remedy.[11]

Despite the basic rules of construction, restated in *Raines, supra*, the court below incorrectly construed the *tentative* exception announced therein, 362 U.S. at p. 23, as extending *Butts* beyond the precise facts presented. And even though exceptions are generally strictly construed, the court below made no attempt to correctly apply the so-called *Butts* exception by determining, *e.g.*: (a) what the *intended* applications of the 1875 Act were; (b) whether, in fact, the vast majority of those intended applications had been invalidated; (c) whether the Act was intended to apply to state action; (d) if so, whether Congress intended the state-action application to stand as valid in event of rejection of the other applications; (e) whether, in the absence of a state remedy for the conduct complained of, the remedial sanction of the Act would be appropriate to enforce equal protection of law; and (f) whether some weighty countervailing policy prohibits validation in the application called for by the pending complaint.

Consequently, the decision below does not accord with the applicable decisions of this Court.

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[9] *Hurd* v. *Hodge*, 334 U.S. 24.

[10] *D. C.* v. *John R. Thompson Co., Inc.*, 346 U.S. 100.

[11] *Monroe* v. *Pape*, 365 U.S. 167.

3. This Case Presents a Serious Federal Question Concerning Discrimination Based on Color

Such a question has been deemed sufficient for granting certiorari. *Boynton* v. *Virginia*, 364 U.S. 454, 457. And it is brought to the Court with a strong belief that the Civil Rights Act of 1875 commands the same momentum of respect as any other federal statute. The possibility that it has present vitality is of particular interest to 20 million non-white people, a great number of whom are being deprived by state action of equal access to publicly licensed and regulated facilities in many parts of the country. The significance of the question is underlined by the fairly recent admission to statehood of Alaska and Hawaii with their multitude of racial groups.

A civil penalty and full costs to compensate for both direct and indirect deprivations of equal protection appear to be reasonable and do not violate due process. *Overnight Motor Transportation Co., Inc.*, v. *Missel*, 316 U.S. 572, 583-584. Such relief would be very helpful to those who find it most difficult, as a practical matter, to prove the precise amount of damages sustained by the humiliation of racial disabilities and to bear the cost thereof; particularly in communities where strong racial prejudice is manifested in customs having the force and effect of law. And it would enhance the implementation of the federal desegregation policy.

For the foregoing reasons, the petitioner prays the Court to grant the writ.

Respectfully submitted,

CHARLES E. WILLIAMS,
Petitioner, Pro se
1329 Shepherd Street, N. W.
Washington 11, D. C.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES E. WILLIAMS, *Appellant*

v.

HOT SHOPPES, INC., *Appellee*

Appeal from the United States District Court for the District of Columbia

No. 16,680, September Term, 1961

Before: BAZELON, WASHINGTON and BURGER, Circuit Judges, in Chambers.

Order

Upon consideration of appellee's motion to dismiss, appellant's opposition, and of appellee's reply, it is

ORDERED by the Court that the motion be granted and this appeal is hereby dismissed on the ground that the action of the District Court complained of in this appeal was consistent with the opinion of this Court in *Williams v. Hot Shoppes, Inc.*, No. 15,610, decided April 20, 1961, —— U.S. App. D.C. ——, 293 F. 2d 835.

Per Curiam.

Dated: November 17, 1961

Before: BAZELON, WASHINGTON and BURGER, Circuit Judges, in Chambers.

Order

Upon consideration of appellant's petition for rehearing, it is

ORDERED by the court that the petition for rehearing is denied.

Per Curiam.

Dated: March 12, 1962

No. 15,610, September Term, 1960

Opinion

Before WILBUR K. MILLER, Chief Judge, and EDGERTON, PRETTYMAN, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, Circuit Judges, sitting *en banc*.

Washington, Circuit Judge, with whom Wilbur K. Miller, Chief Judge, and Prettyman, Danaher, Bastian and Burger, Circuit Judges, concur.

Appellant Charles Williams, a resident of the District of Columbia, brought suit in the District Court against appellee Hot Shoppes, Inc., a Delaware corporation which operates restaurants in several states and the District of Columbia, to recover a statutory penalty of $500 under Sections 1 and 2 of the Civil Rights Act of 1875, and damages of $5,000 under 42 U.S.C. §§ 1981, 1983, for alleged deprivations of his civil rights. In essence, appellant's claim is that on November 5, 1959, appellee's manager denied him service at its restaurant in Alexandria, Virginia, solely because appellant is a Negro, and because Virginia law requires restaurants either to segregate their

facilities or to exclude Negro patrons.[1] Appellant contended that this refusal to serve him was State action of the sort prohibited by the Fourteenth Amendment and the civil rights laws. The District Court held to the contrary and dismissed the complaint. This appeal followed.

I.

First of all, we think that the District Court properly dismissed the claim for the statutory penalty under Sections 1 and 2 of the Civil Rights Act of 1875.[2] These statutory provisions were held unconstitutional as applied to private intrastate racial discrimination in the *Civil Rights Cases*, 1883, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835. Later in *Butts* v. *Merchants' & Miners' Transportation Co.*, 1913,

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[1] A further contention, relative to alleged activities of state officials, will be discussed later in this opinion.

[2] All that appellant has told us in writing on the subject appears at page 9 of his supplemental memorandum in this court, where he says:

> "Va. Code sec. 18-327 has been widely regarded as compelling racial segregation in places of public accommodation of all sorts, including restaurants. Such belief was supported by the decisions of the United States District Court for the Eastern District of Virginia (per Judge Albert V. Bryan who has had long experience with Virginia law) that this provision applies to restaurants. *See Nash* v. *Air Terminal Services*, 85 F. Supp. 545, 548 (1949); *Air Terminal Services* v. *Rentzel*, 81 F. Supp. 611 (1949). This widespread belief was also fostered by the repeated public expressions over the years by many prosecuting officials of Virginia that racial segregation in eating places was required by Virginia law. [*E.g.*, WASHINGTON POST, June 24, 1960, p. A-1.]"

Later, appellant filed with us a number of newspaper clippings in support of the statement last made. Assuming the clippings to be correct reports of various episodes, there is no allegation that they came to appellee's attention, or influenced its action.]

[2] Act of March 1, 1875, ch. 114, §§ 1, 2, 18 Stat. 335, provides: [Provisions set forth verbatim.]

230 U.S. 126, 33 S. Ct. 964, 57 L. Ed. 1422, the Supreme Court held that these provisions could not be applied to penalize racial discrimination aboard interstate carriers even though the statute could, in that application, be upheld under the commerce power. The Court reasoned that since Sections 1 and 2 were penal in nature and were intended by Congress to have uniform national application, and since the provisions had been declared unconstitutional as applied to private intrastate racial discrimination, the statute should be held wholly invalid rather than be applied in only a fraction of the cases it was intended to cover. In *United States* v. *Raines*, 1960, 362 U.S. 17, 23, 80 S. Ct. 519, 4 L. Ed. 2d 524, the Supreme Court expressly reaffirmed the *Butts* decision. Therefore, even if appellee's conduct is assumed arguendo to be State action, Sections 1 and 2 of the Civil Rights Act of 1875 have no present validity, and appellant's claim under them was properly dismissed.[3] * * *

[The remainder of the opinion deals with a claim for damages under 42 U.S.C. §§ 1981, 1983, which was dismissed by the District Court on remand.]

[3] A like decision was reached by the Fourth Circuit in another suit brought by the appellant, at an earlier date. Williams v.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN J. CARMODY
CHARLES J. STEELE
JOHN J. CARMODY, JR.
815-15th Street, N.W.
Washington 5, D. C.
Attorneys for Respondent

WHITEFORD, HART, CARMODY
& WILSON
Of Counsel

May 14, 1962

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INDEX

	Page
Opinions Below	1
Jurisdictional Statement	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Argument	6
I. Lack of Jurisdiction	6
II. Lack of a Final Order	9
III. Civil Rights Act of 1875 of No Current Validity	10

TABLE OF CASES

Butts v. Merchants & Miners Transportation Co., 230 U.S. 126 ..... 10, 11, 12

Civil Rights Cases, 109 U.S. 3 10

Federal Trade Commission v. Minneapolis-Honeywell Regulator Company, 344 U.S. 206 ..... 6, 7, 8

United States v. Raines, 362 U.S. 17 ..... 11, 12

Williams v. Hot Shoppes, Inc., 110 U.S. App. D.C. 358, 293 F. 2d 835 ..... 4, 11

Williams v. Howard Johnson's Restaurant, 268 F. 2d 845 ..... 12n

STATUTES

28 U.S.C. 2101 (c) 21

42 U.S.C. 1983 ..... 3, 4, 11

Civil Rights Act of 1875: c. 114, 18 Stat. 336, 1 Supp. R.S. 148 (1881) & 1 Supp. R.S. 67 (1891) 3, 4, 5, 11

Rule 54(b), *Federal Rules of Civil Procedure* 2, 5, 9, 10

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---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINON BELOW

The opinion below reported at 110 U.S. App. D.C. 358 and 293 F. 2d 835 is printed as an appendix to the Petition for the Writ of Certiorari.

JURISDICTION

The judgment sought to be reviewed was entered on April 20, 1961 and amended on May 22, 1961. The petition herein was not timely filed, therefore, and this Court lacks jurisdiction to grant the petition.

QUESTIONS PRESENTED

1. Whether the petition herein is timely filed so that this Court has jurisdiction to grant certiorari.

2. Whether the order appealed to the Court of Appeals, which is the subject of the Petition for a Writ of Certiorari herein, was a final order and, therefore, properly appealable to the Court of Appeals and properly a subject for a Petition for a Writ of Certiorari.

3. Whether the Civil Rights Act of 1875 is of any present validity with respect to this case.

STATUTES INVOLVED

28 U.S.C. §2101(c):

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil aciton, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.":

Rule 54(b) of the *Federal Rules of Civil Procedure*:

> "(b) judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however desig-

> nated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. As amended April 17, 1961, eff. July 19, 1961."

and the Act of March 1, 1875, c. 114, 18 Stat. 336, 1 Supp. to Rev. Stat. 148 (1874-1881), 1 Supp. to Rev. Stat. 67 (1874-1891), which is set forth in the Petition at pp. 3-4.

STATEMENT

On November 25, 1959, petitioner, Charles E. Williams, filed in the United States District Court for the District of Columbia, a complaint in Civil Action No. 3332-59. This Complaint contained two claims for relief.[1] The first claim was based upon 42 U.S.C. § 1983 and petitioner demanded judgment of $5,000 for the alleged violation thereof. The second claim (also contained in paragraph 9 of the Complaint) demanded a $500 statutory penalty and was based upon Sections 1 and 2 of the Civil Rights Act of 1875.

On December 14, 1959, respondent filed a Motion to Dismiss said Complaint.

On January 27, 1960, the United States District Court for the District of Columbia granted the Motion to Dismiss the Complaint in its entirety. Both the $5,000 and the $500 claims, were, therefore, dismissed.

---

[1] These claims were not set forth in separate counts, and so, for convenience and clarity, may hereafter be referred to as the $5,000 claim and the $500 claim.

Petitioner then appealed the dismissal of the Complaint to the United States Court of Appeals for the District of Columbia Circuit. On April 20, 1961, that Court, sitting en banc, reversed the dismissal of the $5,000 claim based upon 42 U.S.C. § 1983 and that cause was remanded to the District Court. The dismissal of the claim for the statutory penalty under the Civil Rights Act of 1875, however, was affirmed unanimously. Judges Bazelon and Edgerton dissented with respect to the $5,000 claim based upon 42 U.S.C. § 1983, but joined the majority in affirming the dismissal of the $500 claim. *Williams* v. *Hot Shoppes, Inc.*, 110 U.S. App. D.C. 358; 293 F. 2d 835.

The petitioner thereupon filed in the United States District Court for the District of Columbia, a Motion for Leave to Amend the Complaint. This Motion was granted on June 5, 1961. Petitioner then filed the Amended Complaint and, in so doing, not only modified the theory of his claim under 42 U.S.C. § 1983, but also reinserted the claim for the statutory penalty of $500, based upon the Civil Rights Act of 1875. This latter claim was identical to the one which had been dismissed, and the dismissal affirmed unanimously as described above.

Respondent then filed a Motion for Summary Judgment with respect to the entire Amended Complaint. On August 17, 1961, the United States District Court for the District of Columbia denied respondent's Motion for Summary Judgment with respect to the $5,000 claim based upon 42 U.S.C. § 1983,[2] but granted the

[2] On Page 4A of his Petition, in the Appendix, petitioner erroneously states that the claim for damages under 42 U.S.C. § 1983 was dismissed by the District Court on remand. This is not accurate. The claim remains in the District Court following a denial of respondent's Motion for Summary Judgment.

Motion for Summary Judgment with respect to the $500 claim based upon the Civil Rights Act of 1875. Petitioner then appealed the dismissal of the $500 claim even though the District Court did not file a statement under Rule 54(b) of the *Federal Rules of Civil Procedure*, which was necessary to make the dismissal of the $500 claim final, and even though the $5,000 claim based upon the alleged violation of 42 U.S.C. §1983 remained in the District Court awaiting trial.

Respondent then filed a Motion to Dismiss the appeal on two grounds: (1) That the order dismissing the $500 claim was not a final order under Rule 54(b); and (2) that the dismissal of the $500 claim had become the law of the case when on April 20, 1961 the Court of Appeals affirmed the dismissal of that claim and petitioner neither sought rehearing nor a writ of certiorari.

On November 17, 1961, the United States Court of Appeals for the District of Columbia Circuit issued the following order:

> "Upon consideration of appellee's motion to dismiss, appellant's opposition, and of appellee's reply, it is, ORDERED, by the Court that the Motion be granted and this appeal is hereby dismissed on the ground that the action of the District Court complained of in this appeal was consistent with the opinion of this Court in *Williams v. Hot Shoppes, Inc.*, Number 15,610, decided April 20, 1961, [110] U.S. App. D.C. [358], 293 F. 2d 835.
>
> Per Curiam."

Petitioner then sought a rehearing and the Petition for Rehearing was denied on March 12, 1962.

ARGUMENT

I

The Petition Is Not Timely Filed

The first question which presents itself is whether the petition for a writ of certiorari is timely filed so that this Court has jurisdiction.

It becomes obvious, respondent submits, from the above recitation of the history of this litigation, that the 90-day time period during which petitioner could seek a writ of certiorari began to run on April 20, 1961, when the Court of Appeals affirmed the dismissal of the $500 claim, and no rehearing was sought. Petitioner cannot extend the said 90-day period by reinserting the same claim in an amended complaint in the District Court, rather than filing a petition for a writ of certiorari.

The circumstances of this case are quite similar to those of *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Company*, 344 U.S. 206, 97 L. Ed. 245, 73 S. Ct. 245 (1952). The Federal Trade Commission had issued a three part-order against Minneapolis-Honeywell. Part I dealt with § 5 of the Federal Trade Commission Act, Part II dealt with § 3 of the Clayton Act and Part III with §2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The United States Court of Appeals for the Seventh Circuit reversed the Commission with respect to Part III. The opinion stated that since Minneapolis-Honeywell did not "challenge Parts I and II of the order based on the first two counts of the Complaint, we shall make no further reference to them."

The Federal Trade Commission did not petition for rehearing, but, after the time to seek rehearing had expired, filed a memorandum with the Court stating:

"On July 5, 1951, the Court entered its opinion and judgment reversing Part III of the decision of the Federal Trade Commission dated January 14, 1948 and dismissing Count III of the Complaint upon which it is based. No disposition has been made of the Cross-Petition filed by the Commission for affirmance and enforcement of the entire decision. The Commission takes the position that its Cross-Petition should be in part sustained, i.e., to the extent that the Court should make and enter herein a decree affirming Parts I and II of the Commission's order to cease and desist and commanding Minneapolis-Honeywell Regulator Company to obey the same and comply therewith.

"11. In its briefs filed herein, the petitioner abandoned its attack upon Parts I and II of the order and challenged only the validity of Part III of the order (see page 1 of petitioner's brief dated March 15, 1951). Thus, petitioner concedes the validity of Parts I and II of the order and does not contest the prayer of the Commission's Cross-Petition and brief with respect to the affirmance and enforcement of Parts I and II of the order."

Thereupon, the Court issued what it called a "Final Decree", again stating that Part III was reversed and affirming the Commission's order with respect to Parts I and II. The Federal Trade Commission then filed a petition for certiorari within 90 days of the second, or "final" decree of the Court of Appeals, but more than 90 days after the earlier decree of the Court of Appeals when it first reversed Part III and decided it needed to make "no further reference" to Parts I and II.

The Supreme Court held in Minneapolis-Honeywell that it had no jurisdiction to grant certiorari, as the

petition was not timely filed. The Court stated [211, 212]:

> "Thus, the mere fact that a judgment previously entered has been re-entered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.
>
> "The judgment of September 18, which petitioner now seeks to have us review, does not meet this test. It reiterated, without change, everything which had been decided on July 5. Since the one controversy between the parties related only to the matters which had been adjudicated on July 5, we cannot ascribe any significance, as far as timeliness is concerned, to the later judgment."

In the present case, the judgment of November 17, 1961, (rehearing denied on March 12, 1962), which petitioner now seeks to have reviewed, neither disturbed nor revised legal rights or obligations which, by its prior judgment of April 20, 1961, the Court of Appeals had settled with finality. The November 17, 1961 decision reiterated without change everything which had been decided on April 20, 1961.

As this Court has pointed out in many opinions, including *Federal Trade Commission* v. *Minneapolis-Honeywell*, supra, there must be an end to litigation. Petitioner should not be able to extend his time to petition for certiorari by reinserting the identical claim in

the same case, after its dismissal has been affirmed by the Court of Appeals.

Respondent respectfully submits that petitioner's petition for certiorari has not been timely filed and, for that reason, this Court lacks jurisdiction.

II

There Is No Final Order

The second question which presents itself is whether or not there is a final, appealable judgment or order present at all with respect to the $500 claim. Rule 54(b) of the *Federal Rules of Civil Procedure*, as amended, states:

> "(b) Judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, *the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.* In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. As amended April 17, 1961, effective July 19, 1961." (Emphasis supplied).

When the District Court, ruling on the amended complaint, granted the Motion for Summary Judgment

with respect to the $500 claim, it, at the same time, denied the motion with respect to the $5,000 claim. The $5,000 claim now awaits trial on the merits in the United States District Court for the District of Columbia. There being no express determination under the provisions of Rule 54(b) that the dismissal of the $500 claim was a final order, it is not a final order; it was not appealable to the Court of Appeals, and, therefore, is not in the proper posture to be the subject of a petition for a writ of certiorari.

This lack of a final order under Rule 54(b) was one of the grounds relied upon by respondent in its Motion to Dismiss before the Court of Appeals. The fact that the Motion to Dismiss was granted on other grounds does not detract from the validity of this ground.

The $5,000 claim remains in the District Court. There was no express determination of finality made by that Court with respect to the $500 claim. It is respectfully submitted that petitioner does not have an appealable order herein.

III

The Present Validity of the Civil Rights Act of 1875

Sections 1 and 2 of the Civil Rights Act of 1875 were held unconstitutional with respect to private intrastate racial discrimination in the *Civil Rights Cases*, 109 U.S. 3 (1883).

In *Butts* v. *Merchants & Miners Transportation Co.*, 230 U.S. 126 (1913), this Court ruled that these provisions could not be applied to racial discrimination in interstate commerce. The rationale of the Court in *Butts* was that since Sections 1 and 2 were penal in

character and were intended by Congress to have uniform national application, the statute should be held wholly invalid rather than applied in some cases, and not in others.

Recently, in *United States* v. *Raines*, 362 U.S. 17 (1960), this Court expressly reaffirmed *Butts*, i.e., that Sections 1 and 2 of the Civil Rights Act of 1875 are wholly invalid.

In *Williams* v. *Hot Shoppes, Inc.*, 110 U.S. App. D.C. 358, 293 F. 2d 835, the United States Court of Appeals for the District of Columbia sat en banc to decide this very question. Although the Court split 7-2 on another question dealing with 42 U.S.C. § 1983, all nine judges agreed that Sections 1 and 2 of the Civil Rights Act of 1875 were now of "no present validity and appellant's claim under them was properly dismissed."

That these decisions support respondent's position and correctly reflect the law seems clear beyond doubt. In *Butts*, this Court held that Congress intended the Act to have uniform application and, as stated in *Raines*, "was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover."

In the present case, petitioner would have the Court resurrect the Act in a fraction of the cases it was originally designed to cover.[3] Petitioner would have it apply only to acts in which state action is allegedly

[3] Assuming, arguendo, that the Act was intended to cover action by persons other than the proprietors of inns, managers of theatres, etc., acting solely in a private capacity.

involved.[4] This Court has ruled on this very point of fractional application in *Butts*, and reaffirmed that ruling in *Raines*. The Act was not intended to stand as to some situations and not as to others. Respondent respectfully suggests that this question has now been fully answered in *Butts* and *Raines*, and that the petition for certiorari should be denied even if, arguendo, it has been timely filed and there was a final order.[5]

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[4] While respondent assumes, for the sake of the point, that state action is involved, actually no state action is present. The restaurant which allegedly discriminated against petitioner was privately owned, privately managed, and was not located in a building owned by the state, was not in a bus terminal, was not engaged in inter-state commerce and its only connection with the state was one of geography. The Complaint does not allege otherwise, but is based upon the theory that a restaurant located in a state which has a custom of segregation cannot lawfully discriminate because to do so would be to help the state enforce its custom of segregation. The validity of this theory awaits a test in the $5,000 claim now awaiting trial in this very case in the United States District Court for the District of Columbia.

[5] It should also be pointed out that the Civil Rights Act of 1875 refers to "inns", but not to restaurants. When petitioner herein earlier relied upon this Act, and tried to equate an "inn" with a "restaurant", the United States Court of Appeals for the Fourth Circuit, in *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847 FN. 1 (1959) held:

> "1. Even if the Act of March 1, 1875, were valid, it would not support the plaintiff's case since it covers only inns, public conveyances and places of amusement. It has been held in Virginia, *Alpaugh* v. *Wolverton* 184 Va. 943, 36 S.E. 2d 906, in a case which did not involve race relations, that a restaurant owner is not an innkeeper charged with the common-law duty to serve everyone who applies. The Court said at page 948 of 184 Va., at page 908 of 36 S.E. 2d:
>
> 'A restaurant, on the other hand, is an establishment where meals and refreshments are served. 28 Am. Jur. Inn-

For the foregoing reasons, respondent requests the Court to deny certiorari.

JOHN J. CARMODY
CHARLES J. STEELE
JOHN J. CARMODY, JR.
815-15th Street, N.W.
Washington 5, D. C.

Attorneys for Respondent

WHITEFORD, HART, CARMODY
& WILSON
Of Counsel

May 14, 1962

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keepers, § 10, p. 545; 43 C.J.S., Innkeepers, § 1, subsec. b, p. 1132.

"The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. 28 Am. Jur., Innkeepers, § 120, p. 623; 43 C.J.S., Innkeepers, § 20 subsec. b, p. 1169. His rights and responsibilities are more like those of a shopkeeper. Davidson v. Chinese Republic Restaurant Co., 201 Mich. 389, 167 N.W. 967, 969 L.R.A. 1918E, 704. He is under no common-law duty to serve everyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. Nance v. Mayflower Tavern, 106 Utah 517, 150 P. 2d 773, 776; Noble v. Higgins, 95 Misc. 328, 158 N.Y.S. 867, 868."

It is respectfully submitted, therefore, that the Act in question does not apply to the facts of this case, because the alleged discrimination took place in a restaurant, not an inn.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 885

CHARLES E. WILLIAMS, *Petitioner*,

v.

HOT SHOPPES, INC., *Respondent*.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF THE PETITIONER

CHARLES E. WILLIAMS
Petitioner, Pro se
1329 Shepherd Street, N.W.
Washington 11, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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I.

THE COURT HAS JURISDICTION TO REVIEW THIS CASE

Respondent's argument to the jurisdiction of the Court is erroneous.

The original complaint was based on the requirement of racial segregation in restaurants by the Virginia segregation statute. The opinion and judgment of the court below, entered April 20, 1961, recited affirmance of the dismissal of the claim under the Civil Rights Act of 1875, and remanded the complaint for

further proceedings in order to determine its sufficiency under the Civil Rights Act of 1871, 42 U.S.C. § 1983.

On remand, the original complaint was dismissed with leave to file the pending amended complaint to be based on the enforcement of racial segregation in restaurants by state officers.[1] It was at this point that * * * "the lower court change[d] matters of substance" * * * in the case, and the period within which a petition for certiorari could be filed would then * * * "begin to run anew" * * * upon the rendering of a judgment on the amended complaint. See *F.T.C.* v. *Minne-*

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[1] In view of respondent's statement (BR-4, fn) the Order of the District Court granting leave to amend the complaint is fully set forth:

"This cause came on to be heard on motion of plaintiff for leave to amend the complaint, and it appearing to the Court that the complaint properly may be amended to set forth facts showing enforcement of racial segregation in defendant's restaurant by state administrative or executive officers, it is

"ORDERED, that plaintiff's motion for leave to amend the complaint be, and the same is hereby, granted; and it is further

"ORDERED, that the plaintiff shall so amend the complaint as to eliminate any reference whatsoever to Va. Code sec. 18-327 or other state statute, and that the amended complaint shall set forth facts as will constitute a statement of a single cause of action for the alleged discrimination in the defendant's restaurant based upon the enforcement of racial segregation by state administrative or executive officers; and it is further

"ORDERED, that the cause of action alleged in the sixth and seventh paragraphs of the original complaint be, and the same is, hereby dismissed with prejudice.

/s/ "LUTHER W. YOUNGDAHL
"United States District Judge

"Dated: June 5th, 1961."

apolis-Honeywell Regulator Co., 344 U.S. 206, 211-212. Respondent's argument misses the point because it erroneously treats the original complaint as two separate claims, when, as a matter of fact, it constituted a single claim which stated two grounds for recovery. The same is true of the amended pleading.

Again, contrary to respondent's contention, the judgment of April 20, 1961, is not *res judicata* of the pending claim under the Civil Rights Act of 1875. Technically, there was nothing of substance concerning the 1875 statute, in that judgment, to review by certiorari. If the court below could not say that a deprivation of the federal right (to be free from state-sanctioned discrimination) had been sufficiently alleged under 42 U.S.C. § 1983, then it had no occasion to determine the validity of the claim under the Civil Rights Act of 1875.

Therefore, the opinion rendered on the validity of the 1875 statute was based on assumed facts and constituted a dictum on an abstract, contingent and speculative question not properly before the court on the record. Such a decision can not be *res judicata* of a subsequent pleading which does sufficiently allege a cause of action based on discriminatory state action.

Clearly, the pending amended complaint is not "identical" with the original complaint, which, for all intents and purposes, is no longer a part of the pleadings in this controversy. See note 1, *supra*. The pending amended complaint has been held legally sufficient to state a cause of action (based on state action) under the Civil Rights Act of 1871.

Hence, the question of whether the Civil Rights Act of 1875 applies to state action in publicly-created,

licensed and regulated restaurants was squarely presented for the first time in this controversy by the pending amended complaint. And a determination of that question is not foreclosed by the prior opinion and judgment. See pp. 6-8 of the Petition.

Consequently, it is the judgment of November 17, 1961, upon which a timely petition for rehearing was denied on March 12, 1962, which is now sought to be reviewed.

II.

THE ORDER OF THE DISTRICT COURT IN THIS ACTION WAS FINAL AND APPEALABLE

Contrary to respondent's argument, the appealability of the order depends upon its substance and effect, not its designation. The order of the District Court in this case, while it denied a motion for summary judgment, constituted a judgment upon pleas in bar of the action. As such, it deprived petitioner of a substantial remedy, and, most decidedly, denied respondent of substantial defenses. Hence, the judgment is as final and conclusive as one rendered upon proof. *Northern Pacific Ry. Co.* v. *Slaght*, 205 U.S. 122, 130.

III.

THIS ACTION IS NOT A MULTIPLE CLAIM SUIT WITHIN RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The pending claim is a single claim arising out of a single occurrence on November 5, 1959, which states two grounds for relief under the civil rights acts. "The Rules make it clear that it is 'differing occurrences or transactions which form the basis of separate units of judicial action.'" *Reeves* v. *Beardall*, 316 U.S. 283, 285. The 1946 amendment of Rule 54(b) did not

change this principle. *Creel* v. *Creel*, 87 U.S. App. D.C. 79, 82, 184 F. 2d 449, 452.

Furthermore, the District Court was not called upon to, nor did it, adjudicate any "claim for relief * * * presented," within the meaning of Rule 54(b). The only questions before the court on the motion for summary judgment were the legal sufficiency of the complaint and whether the respondent was a proper party to the action. Rule 54(b) does not apply to such determinations. *Youpe* v. *Moses*, 94 U.S. App. D.C. 21, 26-27, 213 F. 2d 613, 619.

IV.

THE LEGISLATIVE MATERIALS AND OTHER EXTRINSIC EVIDENCE TEND TO SHOW THAT THE CIVIL RIGHTS ACT OF 1875 HAS PRESENT VALIDITY

The respondent fails to meet the argument for the constitutionality of the Act in question, particularly in light of the rules of construction for the validation of statutes. Under them, the 1875 statute is before the Court for the first time to test the application of its remedial sanction to state-sanctioned racial discrimination in public restaurants. The Act is thus supported by the presumption of constitutionality since the prior decisions, which rejected it as invalid, are limited to the precise facts then before the Court. The strictness with which this principle has been applied is illustrated in *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-575.

Since this Court never questions legislative wisdom, it must be presumed that Congress, in enacting the 1875 statute, intended to meet a national need by harmonizing, within constitutional bounds, a policy of nondiscrimination with the general welfare. Compact

phrasing or inartistic language will not be permitted to distort or nullify that purpose, *United States* v. *Gaskin,* 320 U.S. 527, 528, 529-530, nor the practical value of the legislation as a remedial or corrective measure. The meaning, policy and purpose of the statute can be ascertained by extrinsic aids and previous experience with the Civil Rights Acts of 1866, 1870 and 1871.

The Civil Rights Act of 1875 is a statement of policy addressed to a group of possibilities and to the attainment of a particular end. If read literally, it may appear *ex directo* to punish purely private action in inns, public conveyances and places of public amusement. But the legislative history indicates that the statute was intended to apply to state action[2] in all facilities "licensed by law" which are "kindred to inns or public conveyances" and "undertake to provide for the public under sanction of law,"[3] including "public houses," "taverns," and a "railroad refreshment room."[4]

Contrary to respondent's contention (BR-12, fn 5) the scope of the term "inns" in the Act, for equal protection purposes, is limited neither by the common law definition of an unlicensed inn nor by state law definitions for police purposes, such as, health, morals, bailments, revenue, licensing, liquor control, etc. The gen-

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[2] Mr. Benjamin Butler, Chairman, House Judiciary Committee, explaining the scope of the legislation, CONG. REC., 43rd Cong., 1st Sess., pp. 340-341; Senator Charles Sumner, author of the legislation, explaining that it was supplementary to existing civil rights legislation, CONG. GLOBE, 42nd Cong., 2nd Sess., pp. 381, 383.

[3] Sen. Sumner, *ibid.*

[4] Mr. Butler, CONG. REC., 43rd Cong., 2nd Sess., pp. 940, 1006.

eral history of the times indicate that public houses of all kinds, including victualling and refreshment houses, were included in the statutory conception of inns.[5]

Legislation, generally, seldom attains more than approximate precision. Statutes are instruments of government which partake of practical purposes, infirmities, limitations, awkward and groping efforts. Hence, the actual issue in litigation must be the determinate of their effect. See Max Radin, Statutory Interpretation, 43 HARV. L. REV. 863, 868-869 (1930); Archibald Cox, Judge Learned Hand and the Interpretation of Statutes, 60 HARV. L. REV. 370, 384-390 (1947); Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 528 (1947).

Finally, respondent misconceives the thrust and insights of the petition. The application of the statute called for by the pending complaint would cover, not a fraction, but all of the cases Congress originally intended to cover. The complaint calls for a uniform national application to racial discrimination which is enforced by governmental authority, either directly or indirectly, at all levels, in all jurisdictions, federal and state, throughout the United States.

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[5] See *e.g.*, WILLCOCK, LAWS RELATING TO INNS, HOTELS, ALEHOUSES AND PLACES OF PUBLIC ENTERTAINMENT (London, 1829), p. xiv; Refreshment Houses Act of 1860 and the Innkeepers Liability Act of 1863, 23 & 24 Vict., c. 27, and 26 & 27 Vict., c. 41, respectively; 9 COMP. STAT. ENG. 923, 925 (1929); 17 HALSBURY, LAWS OF ENG. 305 (1905).

V.

IT IS RESPECTFULLY SUGGESTED THAT REVIEW OF THIS CASE COULD POSSIBLY HAVE THE ULTIMATE EFFECT OF EXPEDITING JUDICIAL BUSINESS

The question of whether local segregation, breach of the peace, disorderly conduct and anti-trespass statutes have been violated by persons who sought the accommodations of publicly-licensed and regulated facilities, which are regularly made available to the general public, is presented in scores of so-called "sit-in" cases now pending in a number of state and federal jurisdictions.

It is respectfully suggested that if the Court should ultimately decide that the federal right to be free from state-sanctioned racial disabilities is also secured by the Civil Rights Act of 1875, a number of such cases could be resolved, at least where the convictions rest solely on evidence of the mere peaceable assertion of the federal right. The dockets of the lower courts could be relieved, judicial business could be expedited, and the public interest would thus be served.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petitioner prays the Court to grant the Writ of Certiorari.

Respectfully submitted,

CHARLES F. WILLIAMS
Petitioner, Pro se
1329 Shepherd Street, N.W.
Washington 11, D. C.

May 18, 1962